SUMMARY OF SECTION 29 DECISIONS (Right to Sue Applications)

Glen Johnson
Workers' Compensation Appeals Tribunal
Dated: April 10, 2006

106-05429/

INTRODUCTION

Section 29 of the *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, as amended [the "*Act*"] gives the Tribunal authority to determine whether a right of action against an employer is barred by Part I of the *Act*. Section 28(1) of the *Act* sets out the historic trade-off between workers and employers: namely, that the rights provided under Part I of the *Act* are in lieu of all rights and rights of action against an employer subject to Part I, as a result of personal injury by accident. A party to an action may make application to the Chief Appeal Commissioner for a determination under the "bar to suit" provision. Section 3.40 of the Tribunal's Practice Manual provides guidance in making such an application; for ease of reference, it is set out at the end of this Introduction.

Since its formation, the Tribunal has had occasion to make rulings on the "right of action" and related matters. While relatively few in number as compared with compensation-related appeals, the Tribunal's determinations under s. 29 of the *Act* are of significance. These decisions assist in clarifying the legal rights and obligations of employers and workers, respectively, and operate as a first-instance determination of the right to bring legal action against an employer.

This document summarizes all the decisions rendered by the Tribunal and the Court of Appeal since the Tribunal's inception, respecting applications under s. 29. These summaries are not authoritative; they exist to provide an overview, to assist legal counsel, potential parties and other interested readers. The particular interpretation or import of any decision is of course open to argument by parties before the Tribunal.

Potential parties may also wish to refer to the Tribunal's "Summary of Recent Notable Court Decisions", particularly with reference to non-section 29 decisions concerning recognition - whether an accident "arose out of and in the course of employment" - and the historic trade-off. In the same vein, previous Tribunal decisions on those issues may also be of assistance in a section 29 application, as many of the same considerations apply.

Statutory and Regulatory Provisions

Sections 28 to 33 inclusive of the *Act* are the relevant statutory provisions.

Sections 28 and 29

The most frequently utilized sections are sections 28 and 29: Section 28 defines the circumstances wherein an action is barred, while section 29 states that the Tribunal possesses the exclusive jurisdiction to determine whether an action is barred. Sections 28 and 29 state:

28 (1) The rights provided by this Part are in lieu of all rights and rights of action

to which a worker, a worker's dependant or a worker's employer are or may be entitled against

(a) the worker's employer or that employer's servants or agents; and

(b) any other employer subject to this Part, or any of that employer's servants or agents,

as a result of any personal injury by accident

(c) in respect of which compensation is payable pursuant to this Part; or

(d) arising out of and in the course of the worker's employment in an industry to which this Part applies.

(2) Clause (1)(b) does not apply where the injury results from the use or operation of a motor vehicle registered or required to be registered pursuant to the *Motor Vehicle Act*.

29 (1) Any party to an action may apply to the Chief Appeal Commissioner of the Appeals Tribunal for determination of whether the right of action is barred by this Part.

(2) An application made pursuant to subsection (1) shall be determined by the Appeals Tribunal constituted according to Section 238.

(3) The Appeals Tribunal has exclusive jurisdiction to make a determination of whether the right of action is removed by this Part.

(4) The decision of the Appeals Tribunal pursuant to this Section is final and conclusive and not open to appeal, challenge or review in any court, and if the Appeals Tribunal determines that the right of action is barred by this Part, the action is forever stayed.

Section 30

Tribunal decisions have also found that the Tribunal has jurisdiction to determine whether an action is barred by operation of section 30 of the *Act*.

Workers' Compensation General Regulations

Also relevant are the inclusions and exclusions set out in the *Workers' Compensation General Regulations*, which give effect to subsections 3(1) and 3(2) of the *Act* by setting

out which industries and classes of worker are and are not covered by the workers' compensation regime.

Date of Accident

Pre-February 1, 1996

The Tribunal has no jurisdiction pursuant to s.29, with respect to an accident occurring prior to February 1, 1996; in such cases, a judge of the Supreme Court determines whether an action is barred. See *Goulden* v. *Nova Scotia Workers' Compensation Appeals Tribunal and Taylor* (1999), 177 N.S.R (2d) 374 (NSCA).

February 1, 1996 to October 1, 1998

The Tribunal has jurisdiction with respect to accidents dating from February 1, 1996 onward.

Note that any accident occurring from February 1, 1996 to October 1, 1998 involves the previous wording of ss. 30 and 31 of the *Act*; in such instances, the worker does not possess the right to elect to proceed with a civil proceeding, but requires the consent of the Board to initiate a civil proceeding where there co-exists a right to workers' compensation and a right to a civil action against a party. See *Decision No.2000-285-TPA* (December 27, 2000, NSWCAT).

Post-October 1, 1998

The current wording of ss. 30 and 31 of the *Act* governs.

Appeal from Tribunal Decision

Queen Elizabeth II Health Sciences Centre v. *Workers' Compensation Board (N.S.) et al.* (2001), 193 N.S.R. (2d) 385 (NSCA) has clarified that an appeal lies to the Court of Appeal from a s. 29 decision, pursuant to s. 256 of the *Act*. An appeal lies on a question of jurisdiction only.

Tribunal Practice Manual

Section 3.40 of the Tribunal Practice Manual states:

3.40 Application to Determine if a Right of Action Against an Employer is Barred

Section 29 of the *Act* allows any party to an action to apply to the Chief Appeal Commissioner to determine whether a right of action is barred by s.28(1) of the *Act*. The Section 29 Application form may be downloaded from the Tribunal's website at www.gov.ns.ca/wcat/. Applications must be made to the Chief Appeal Commissioner and should include the following:

! copies of all pleadings in the action and in any other action arising out of the same set of facts
! if not in the pleadings, a brief statement of the facts giving rise to the action
! the remedy or remedies sought (for example, a finding that the action is barred for one or more parties to the application)
! notice of any workers' compensation claim which is related to the cause of action
! information concerning whether a potential participant is an assessed employer under the *Act*
! a list of any potential respondents or participants in the application, including any representatives for the respondents or participants
! the residency of any potential participant to the application
! the trial date(s) for the action if known
! an indication as to how the application should proceed (either by way of oral hearing or by written submission)
! the likelihood of an agreed statement of facts; and
! the likelihood that legislation other than the *Act* may be considered in the application

Completion of the Tribunal's Section 29 Application form will generally satisfy the requirements for initiating an application under s. 29 of the *Act*. The completed form or a written letter of application may be hand delivered to the Tribunal or sent by mail or by fax. All documentation and information contained in the application should be provided to the Tribunal, the Board, and all potential participants (including a worker's employer). Parties other than those named in the application may assert that they have an interest in the application and may ask the Tribunal for a ruling on their participation. The Tribunal will determine if they have an interest which entitles them to participate. The Tribunal may also advise other interested parties of the application.

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1. *Decision 96-001-TPA* (November 14, 1996, NSWCAT)

- Transitional issues
- Tribunal jurisdiction

The Plaintiff worker suffered injuries on November 14, 1992. The Plaintiff filed a lawsuit against the Defendant on May 17, 1993. The Defendant was apparently not covered by the workers' compensation regime. The Defendant then sued the Third Party (the assessed employer of the Plaintiff worker). The Third Party applied to the Nova Scotia Supreme Court in November 1995, to bar the action against him, pursuant to the former version of the *Workers' Compensation Act* [the "*former Act*"]. The Court determined that the Third Party Application ought not be resolved on a summary application, but that the Defendant's assertions raised a triable issue which should be resolved only after the submission of evidence, and full argument.

Notwithstanding the Court's decision, the Third Party subsequently brought a section 29 application before the Tribunal to strike the Third Party Action. The Tribunal found that it did not possess jurisdiction to resolve the matter. First, the Tribunal concluded that the Supreme Court had retained jurisdiction over the application to bar the action, and would determine it in conjunction with the trial. Consequently, the Tribunal would be usurping the Court's authority if it entertained the Third Party Application. Second, the resolution of the Application would turn on an adjudication concerning the enforceability of the lease agreement, which the Tribunal determined was beyond its purview.

2. *Decision 96-002-TPA* (November 28, 1996, NSWCAT)

- Transitional issues
- Tribunal jurisdiction

This Tribunal decision involved the same fact situation as *Decision 96-001-TPA*, *supra*. *Decision 96-002-TPA* concerned an application by the Defendant, while *Decision 96-001-TPA* concerned a Third Party Application.

The Tribunal resolved *Decision 96-002-TPA* solely on jurisdictional grounds. The proceeding had been commenced when the *former Act* was in force, and the Defendant had pleaded the statutory bar in his Statement of Defence. The Tribunal determined that the proceeding which had been commenced under the repealed legislation could not be adapted to the procedures set out in the new *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, as amended [the "*Act*"], and therefore the proceeding should be continued as if the old legislation were still in effect. Consequently, the Court retained jurisdiction over the merits of the application.

The reasoning in *Decisions 96-001-TPA* and *96-002-TPA* has been superseded on the transitional issues by the Court of Appeal's decision in *Goulden*, *infra*.

3. *Decision 98-062-DA* (March 23, 1998, NSWCAT), upheld in *Imperial Oil Limited* v. *Parsons* (1998), 170 N.S.R. (2d) 374 (NSCA)

- Independent cause of action

The Plaintiff worker suffered a workplace injury on August 19, 1994. Prior to the injury, he had purchased private group disability insurance from his employer.

The Plaintiff sued the insurer for failing to honour the insurance agreement. The Plaintiff then sought to add the employer as a defendant, alleging that the employer was liable either for negligent mis-statement or breach of contract because (a) the employer had provided a pamphlet which erroneously described the benefits offered by the private insurance policy, and (b) the employer failed to provide the Plaintiff with a copy of the insurance policy.

The employer brought an application to the Tribunal pursuant to s.29(1) of the *Act*, to determine whether the Plaintiff's civil action against it was barred by s.28 of the *Act*.

The Tribunal denied the employer's application. In framing the issue, the Tribunal stated:

> If it is found that the basis for the action before the Supreme Court of Nova Scotia is a personal injury by accident arising out of and in the course of the worker's employment, the Tribunal's conclusion would be that the action is barred.

The Tribunal accepted the Plaintiff's assertion that the basis for the action must be categorized to determine whether the action is barred. The Tribunal found that the expression "characterization of the cause of action" equated to an identification of the event or events which gave rise to the action.

In finding that worker's action against the employer was not barred, the Tribunal concluded that the action did not arise directly from the work accident, but from the employer's alleged negligent mis-statement or breach of contract flowing from the circumstances attending the issuance of the private insurance. In particular, the Tribunal found that the cause of action could exist notwithstanding the workplace accident. For example, if the worker had been injured in a non-workplace accident, his action against the employer would still exist. In other words, the worker could have sued concerning the negligent mis-statements or breach of contract, even if the workplace accident had never occurred.

The Tribunal rejected the employer's argument that the action existed only because of the workplace accident. The Tribunal found that the employer could not be shielded from an action relating to its alleged mis-statements or breach of contract merely because a workplace accident had coincidentally occurred.

Decision 98-062-DA also emphasized that not all actions by a worker against an employer

are barred by the workers' compensation regime; to be barred, the action must directly arise from a workplace accident.

Decision 98-062-DA was upheld by the Court of Appeal in *Imperial Oil Limited v. Parsons* (1998), 170 N.S.R. (2d) 374 (NSCA)

The Court of Appeal stated the following in dismissing the employer's appeal:

> In the present appeal the Appeals Tribunal found:
>
> > . . . [T]hat Parsons' action against Imperial stands alone notwithstanding his work accident and consequently cannot have been intended to be barred pursuant to s.28 of the *Act*. We do not believe it was the intention of the Legislature in this Province to shield the employer from a cause of action which can stand alone independent of the work accident simply because it arose simultaneously to the work accident itself.
>
> The finding that the insurance action in question "stands alone" is a finding that it was not the "result of any personal injury by accident" in the workplace, which is squarely within the Tribunal's core jurisdiction under ss. 28 and 29. The action is to be barred only if it is found to have resulted from such an accident; we must defer to the Tribunal's finding unless that finding is patently unreasonable.
>
> The facts on which Mr. Parsons' insurance action is grounded existed independently of the accident and predated it. Those facts were discovered when Omaha refused Mr. Parsons' claim. But they came into existence when Imperial sold him the insurance, if, as he alleges, the risks covered do not correspond with the risks for which coverage was purchased. While a disabling accident was the event most likely to result in the discovery of the right of action, an accident was not essential to his action against Imperial. If Mr. Parsons had acquired a copy of the policy and compared it with the company booklet, he might have discovered the cause of action he asserts at any time. Even if the Tribunal's decision was wrong at law, and in my view it was not, it was not an irrational finding. It was not patently unreasonable.

4. *Decision 99-347-PTPA* (January 27, 1999, NSWCAT), overturned in *Goulden* v. *Nova Scotia Workers' Compensation Appeals Tribunal and Taylor* (1999), 177 N.S.R. (2d) 382 (NSCA)

- Transitional issues
- Tribunal jurisdiction

This decision involved an accident which occurred prior to the proclamation of the *Act*. However, the action was commenced subsequent to February 1, 1996 (the date the *Act* generally came into effect).

The Applicant Defendant applied pursuant to s.29(1) for a determination that the action against him was barred. The issue: Did the Tribunal have jurisdiction over an accident occurring prior to the coming into force of the *Act*?

The Tribunal determined that it did have jurisdiction over the Application, and that it would possess such jurisdiction even if the *former Act* applied to the substance of the Application. First, the Tribunal found that the right to apply for a determination whether an action was statute-barred arose when the civil action was commenced. In this instance, the action was commenced on May 23, 1996, subsequent to the proclamation of the *Act*. The Tribunal relied upon *Decision 96-001-TPA*, *supra*, in reaching this conclusion. Even if the date of accident were the relevant reference point, the Tribunal concluded that the choice of forum was procedural, and therefore the *Act* provisions conferring jurisdiction on the Tribunal applied, given that a "repeal and substitution" per the *Interpretation Act* was involved. The Tribunal also looked to *Decision 96-002-TPA*, *supra*, for the proposition that procedural provisions operated retroactively. However, the Tribunal distinguished *Decision 96-002-TPA* because, in the present appeal, the statutory bar under the workers' compensation regime had not been pleaded before the Court in the Statement of Defence; in *Decision 96-002-TPA*, the statutory bar had been pleaded before the Court.

Decision 99-347-PTPA was overturned in *Goulden v. Nova Scotia Workers' Compensation Appeals Tribunal and Taylor* (1999), 177 N.S.R. (2d) 382 (NSCA). In finding that the rights of the parties crystallized at the time of the accident, the Court stated:

> [10] It is reasonable to accept that the rights of the parties crystallized at the time of the accident. At the moment he was injured, Mr. Goulden had a common law right of action against Mr. Taylor. This right of action was subject to ss.18 and 19 of the old *Act*; the determination whether it was barred would have been made by a Supreme Court judge. He also had a right to seek workers' compensation benefits. It was the circumstances of the accident and the statutory provisions, and not Mr. Goulden's election to accept workers' compensation benefits, that made his action subject to be barred. Subrogation of the Board was provided for by statute.

The Court of Appeal substantially accepted the Tribunal's categorization of the matter as

one of "repeal and substitution". However, the Court noted that there existed an appeal from a determination of a Supreme Court judge to the Court of Appeal, while no such appeal existed from a Tribunal determination pursuant to s.29, given the s.29(4) privative clause. Thus, the right of appeal from a determination of a Supreme Court judge was a substantive right which vested at the time of the accident. The procedures of the *Act* could not be adapted in a manner which respected that vested right. The Court also found that the Supreme Court of Nova Scotia would have jurisdiction to determine whether the action was barred, regardless of whether the *former Act* or the *Act* applied substantively to the application.

5. *Decision 99-876-TPA* (August 30, 2000, NSWCAT), overturned by *Queen Elizabeth II Health Sciences Centre* v. *Workers' Compensation Appeals Tribunal (N.S.) et al.* (2001), 193 N.S.R. (2d) 385 (NSCA)

- Appeal procedure to Court of Appeal
- Covered employers/employees
- Medical negligence
- Workers' Compensation General Regulations

In *Decision 99-876-TPA* (August 30, 2000, NSWCAT), a Tribunal panel decided that a civil action against several medical professionals and a hospital could be sustained, for the allegedly negligent medical treatment of a workplace injury. The Tribunal's decision involved a detailed discussion of the inclusions and exclusions found in the *Workers' Compensation General Regulations*. Given its interpretation of the *Workers' Compensation General Regulations*, the Tribunal found that the reasoning in *Kovach* v. *British Columbia (Workers' Compensation Board)* [2000] 1 S.C.R. 55 and *Lindsay* v. *Saskatchewan (Workers' Compensation Board)* [2000] 1 S.C.R. 59 did not require that the statutory bar apply to medical negligence claims in Nova Scotia concerning the treatment of workplace injuries.

Decision 99-876-TPA was overturned by the Court of Appeal in *Queen Elizabeth II Health Sciences Centre v. Workers' Compensation Appeals Tribunal (N.S.) et al.* (2001), 193 N.S.R. (2d) 385 (NSCA). The hospital was the only party to appeal *Decision 99-876-TPA*.

In allowing the appeal, the Court noted that section 2 of the *Workers' Compensation General Regulations* listed the "operation of hospitals" as an included industry under Part I of the *Act*. The Court considered it "patently unreasonable" to find that the term "surgical medical"—an excluded industry under section 3 the *Workers' Compensation General Regulations*—applied to the activities of the physicians and physiotherapists who were servants and agents of the hospital, so as to deprive the hospital of the benefits of the statutory bar to a civil action. The following conclusions were reached by the Court:

• Considering the legislative history of ss. 29 and 256 of the *Act*, there existed a right of appeal to the Court of Appeal despite s. 29(4), which purports to make the Tribunal's decisions in this area "final and conclusive".

• The right of appeal is on questions of jurisdiction, only; consequently, the Tribunal's decisions must be "patently unreasonable" to be overturned.

• The panel's decision that an employer may be subject to the *Act* in general terms and, at the same time, not subject to the *Act* on a case-by-case basis, was patently unreasonable. This conclusion made the *Act* "unworkable."

6. *Decision 2000-285-TPA* (December 27, 2000, NSWCAT)

- Motor vehicle exception - s. 28(2)
- Section 30
- Subrogation/election/consent
- Tribunal Jurisdiction

This application concerned a motor vehicle accident which occurred on January 6, 1998. The Plaintiff worker applied to the Tribunal, to determine whether he could proceed with his action against the Defendant. The Applicant's action was not barred against an employer other than the Applicant's own employer, because a motor vehicle accident was involved (s. 28(2) of the *Act*). However, at issue was whether the action was barred pursuant to s.30, owing to the Board's lack of consent to the Plaintiff worker's action. (The date of the relevant accident fell between February 1, 1996, and October 1, 1998, and thus the former wording of sections 30-31 governed).

The Tribunal determined that it possessed the jurisdiction to consider an application based on the operation of s.30, as opposed to s.28 of the *Act*. The Tribunal noted that section 30 did not merely subrogate a worker's action to the Board, but vested all the worker's rights in the action with the Board. Although subrogation alone would not necessarily bar a worker's right to pursue an action, the additional wording vesting all the worker's rights to the cause of the action in the Board meant that a worker's action was barred if the Board did not consent to the action. Thus, the Tribunal determined that the Plaintiff worker's action was barred, owing to the Board's lack of consent to the action. The Tribunal expressly made no finding whether the action would be barred, if the Board retroactively granted its consent to the action.

7. *Decision 2001-73-TPA* (February 28, 2001, NSWCAT)

- Covered employers/employees
- Motor vehicle exception - s. 28(2)

This decision concerned an August 9, 1998 accident, which involved the worker falling off a truck driven by a fellow employee. As a result of the accident, the worker underwent a number of surgeries.

The worker sought a determination pursuant to s. 29 of the *Act* that his civil action was not barred by operation of s. 28 of the *Act*.

The Tribunal noted that the civil action was against the worker's own employer and the fellow employee, who was the employer's servant. Consequently, the action was barred per s. 28(1)(a) of the *Act*. The exception relating to accidents arising out of the use or operation of a motor vehicle (s. 28(2) of the *Act*) did not assist the worker, as s. 28(2) only applies to s. 28(1)(b), which concerns actions against parties other than the worker's own employer and that employer's servants and agents. Section 28(2) does not permit a civil action against a worker's own employer or that employer's servant or agents, as was the situation in this appeal. Hence, the worker's action was barred.

8. *Decision 2000-305-TPA* (March 19, 2001, NSWCAT), but see the reasoning in *Spencer v. Mansour's Ltd. et al.*, 2000 NSCA 59

- Covered employers/employees
- Inter-jurisdictional issues
- Motor vehicle exception - s. 28(2)

Decision 2000-305-TPA held that one of the applicant employers was not an "employer" within the meaning of the *Act*, so as to bring it within the protection afforded by s. 28(1), because it did not operate in Nova Scotia or pay premiums to the Nova Scotia Workers' Compensation Board.

The action against the second employer did not fall within the s. 28(2) exception to the statutory bar pertaining to "the use or operation of a motor vehicle". The Tribunal held that s. 28(2) should be interpreted as creating an exception only for those matters which would be covered by mandatory motor vehicle insurance. In this case, the nature of the action was one of product liability rather than "the use or operation of a motor vehicle", because it involved a suit against the manufacturer of a faulty car seat which allegedly caused injury to the worker when it malfunctioned while he was driving. In reaching this conclusion, the Tribunal considered the Inter-Jurisdictional Agreement on Workers' Compensation, entered into pursuant to the *Mutual Aid Regulation*, NS Reg. 143/91. However, the Tribunal did not consider the previous Court of Appeal decision in *Spencer* v. *Mansour*, *infra*.

In *Spencer v. Mansour's Ltd. et al*, 2000 NSCA 59, the Court of Appeal considered whether the Inter-Jurisdictional Agreement could give rise to the statutory bar in favour of an assessed Nova Scotia employer, with respect to an accident suffered in Nova Scotia by a New Brunswick employee of an assessed New Brunswick employer.

Spencer was a resident of New Brunswick who worked for a New Brunswick-based messenger service. While carrying out his employment duties in Nova Scotia, in particular making a delivery to Mansour's Ltd. in Amherst, Spencer slipped and fell on the sidewalk. Spencer sued three entities, all of which were paid-up employers under the Nova Scotia workers' compensation regime. At trial, it was found that Spencer's action was not statute-barred under the *former Act* because he lived and was employed outside the jurisdiction, and thus was not a "worker" under the *former Act*. The paid-up Nova Scotia employers argued that the *former Act* operated to bar the action against them, particularly in the light of the Inter-Jurisdictional Agreement.

The Court of Appeal rendered its decision based on the *former Act*, but indicated that the same result would be reached under the *Act*. The Court of Appeal found that the worker's action was statute-barred, for the following reasons:

! The definition of worker under the *former Act* is silent as to place of residence, which appears relevant only to ss. 14 and 15.

- Section 14 makes provision for workers such as the respondent who reside outside of Nova Scotia but suffer workplace injuries within the province and who are thereby made subject to the *former Act* - that is, workers within the meaning of the *former Act*.

- A conclusion that a worker at a workplace within Nova Scotia is not covered by workers' compensation merely because he or she resides out of the province conflicts with considerations of comity among provinces and the expressions of principle in the Inter-Jurisdictional Agreement.

- Given the mobility of workers among workplaces, the historic tradeoff would be seriously eroded by the strict application of residence requirements. Employers accepting out of province deliveries would be exposed to employee actions from which workers compensation schemes were intended to protect them. That would be particularly true for employers (such as the appellants) situated near provincial boundaries, where such deliveries might be a daily occurrence. The situation would be similar when out-of-province contractors send in teams of specialists.

In *Spencer v. Mansour*, there was no reference to the *Mutual Aid Regulation*. The *Mutual Aid Regulation* was promulgated under the *former Act*.

Neither *Decision 2005-305-TPA* nor *Spencer* v. *Mansour* referenced s. 166 of the existing *Act*, which sets out the Workers' Compensation Board's authority to enter into inter-jurisdictional agreements.

9. *Decision 2001-105-TPA* (September 18, 2001, NSWCAT)

- Motor vehicle exception - s. 28(2)
- Scope of employment duties
- Travel to, from or during work
- Work-relatedness - tests

In *Decision 2001-105-TPA*, the worker was injured in a single-vehicle accident, while driving home from an employer-sponsored golf tournament held for the employer's customers. It was expected that alcohol would be consumed at the tournament. The worker used his vehicle to transport materials to the tournament, for the employer. A panel found that the worker, who was intoxicated at the time of the accident, was acting within his employment; the action was therefore barred under s. 28 of the *Act*. The golf tournament was found to be "reasonably incidental" to employment, as was the worker's drinking, and his driving, on the day in question. Further, the drinking was not such as to take the worker outside of the scope of his duties.

10. *Decision 2001-294-TPA* (November 19, 2001, NSWCAT)

- Motor vehicle exception - s. 28(2)
- Onus of proof

In *Decision 2001-294-TPA*, the injuries sustained by a worker who was trapped between a loading ramp and the tailgate of a truck while loading cylinders onto the truck were found not be actionable. The accident occurred on the premises of a third party employer, and the Tribunal found that no motor vehicle belonging to the third party employer or its employee was involved. The accident arose out of and in the course of employment, and did not arise out of the "use or operation of a motor vehicle" belonging to the third party employer. The Tribunal also considered that if the third party employer were found liable, it would not benefit from either the statutory bar in the workers' compensation context or from its mandatory motor vehicle insurance. Such a result would be inconsistent with the principles underlying the historic trade-off.

For the purposes of the section 29 Application, the Tribunal rendered its decision on the basis of the evidence adduced by the worker. The Tribunal noted that the Application concerned the statutory bar only, not entitlement to workers' compensation benefits.

11. *Decision 2001-458-TPA; Decision 2001-435-TPA* (March 25, 2002, NSWCAT), upheld in *Lanteigne v. Workers' Compensation Board (N.S)*, 2002 NSCA 156

- Covered employers/employees
- Motor vehicle exception - s. 28(2)
- Multi-use vehicles
- Tribunal jurisdiction

In *Decision 2001-458-TPA;2001-435-TPA*, a Tribunal panel found that the toppling over of a 50-tonne carrier which was capable of being driven to a work site but, once there, was stationary while working as a crane, did not involve the "use or operation of a motor vehicle".

In reaching this conclusion, the panel applied *F.W. Argue Ltd. v. Howe* [1969] SCR 354, to the effect that the purpose for which the "multiple purpose" or "multiple use" machinery is being used is determinative of its status as a motor vehicle. While stationary and being used at the worksite, with its wheels off the ground, the carrier/crane formed part of the worksite and was not being used or operated as a motor vehicle. Consequently, the s. 28(2) exception to the statutory bar did not apply.

The determination that the carrier/crane fell outside of the "motor vehicle" exception was also based, in the alternative, on a consideration of the two-part test in *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 404:

• Did the accident result from the ordinary and well-known activities to which automobiles are put?

• Is there some nexus or causal relationship between the injuries and the ownership, use, or operation of the motor vehicle, or is the connection merely incidental or fortuitous?

The panel also agreed with past Tribunal decisions that s.28(2) of the *Act* aimed to create an exception to the statutory bar only in those instances where an employer would benefit from mandatory motor vehicle insurance, though this finding was not central to the panel's conclusion.

The Tribunal found that the action was barred against the applicants, with the exception of a holding company which was not a covered employer; the applicants did not argue the holding company enjoyed immunity from suit as an affiliated company.

In *Lanteigne v. Workers' Compensation Board (N.S)*, 2002 NSCA 156 (December 10, 2002), the Court of Appeal upheld *Decision 2001-458-TPA; 2001-435-TPA*.

The Court approved the Tribunal's finding that the purpose for which a "multiple purpose" or "multiple use" machine is used determines its status as a motor vehicle; the Tribunal's conclusion was not patently unreasonable. Since the "Grove Carrier" was stationery and

being operated as a crane when it fell over, it was not operating as a "motor vehicle" within s. 28(2) of the *Act*, and the exception to the statutory bar did not apply.

The Court considered whether the Tribunal had made a jurisdictional error by hearing submissions and evidence on the existence of mandatory motor vehicle insurance, and the other insurance contracts considered at the hearing. The Court found the Tribunal did not err in jurisdiction by hearing evidence and submissions on insurance coverage; it was necessary to hear evidence to decide whether the Tribunal had jurisdiction to refer to the *Insurance Act*. Moreover, the Tribunal's discussion of this point did not form part of its reasoning and conclusion on the main point, and was *obiter*.

12. *Decision 2001-808-TPA* (May 31, 2002, NSWCAT)

- Motor vehicle exception - s. 28(2)
- Onus of proof

In *Decision 2001-808-TPA*, the Tribunal again considered the exception to the general bar to action in s. 28(2), pertaining to the "use or operation of a motor vehicle...".

The accident occurred on the premises of a third party employer. The worker and employees of the third party employer were unloading barrels from the worker's employer's truck. The worker sustained injuries when a barrel dropped while being unloaded from the vehicle. The worker alleged negligence on the part of the third party employees.

The Tribunal found the fact situation did not fall within the section 28(2) exception. First, the third party employer could not benefit from mandatory automobile insurance coverage, as its vehicle was not involved. Second, the fact situation involved a classic industrial accident, not a motor vehicle accident. Third, the worker had not adduced facts bringing himself within the s. 28(2) exception. The Tribunal's opinion in *Decision 2001-458-TPA;2001-435-TPA* (March 25, 2002, NSWCAT), was followed in reaching this outcome.

13. *Decision 2003-145-TPA-1* (March 11, 2003, NSWCAT)

- Covered dependents

Decision 2003-145-TPA-1 found that the right of action of the wife and children of a deceased worker who was fatally injured in a work-related accident, was barred because the wife and children were "dependants" of the worker, as that term is defined in s. 2(l) of the *Act*. As dependants, they were specifically included within the statutory bar.

14. *Decision 2002-928-TPA* (June 18, 2003, NSWCAT)

- Employer premises
- "Highway"
- Motor vehicle exception - s. 28(2)

In *Decision 2002-928-TPA*, an accident which caused fatal injuries to a worker was found not to fall within the scope of s. 28(2) of the *Act* where the injuries did not result from the "use or operation of a motor vehicle registered or required to be registered under the *Motor Vehicle Act*". The worker had been pinned and crushed between a forklift and his truck, on the premises of the third party employer's lumber yard. The forklift, although a "motor vehicle", was not one intended to be operated on a "highway" in the Province since its use was restricted to a lumber yard; the lumber yard was not a "highway" per s. 2(u)(ii) of the *Motor Vehicle Act*.

Applying the two-part test in *Amos* v. *Insurance Corporation of British Columbia* [1995] 3 S.C.R. 405, the worker's injuries did not result from the use or operation of his truck since the circumstances did not constitute the ordinary and well known activities to which automobiles are put. Further, there was no nexus between the injuries and the ownership, use, or operation of the truck.

15. *Decision 2002-844-TPA* (June 26, 2003, NSWCAT)

- Covered employers/employees
- Medical negligence
- Section 30
- Subrogation/election/consent

This appeal involved the same fact situation addressed in *Decision 99-1876-TPA* (August 30, 2000, NSWCAT) and *Queen Elizabeth II Health Sciences, supra*.

In this Application, the physiotherapists applied to the Tribunal, to determine if the worker's action were barred pursuant to s. 28 of the *Act*, as well as s. 30 of the *Act*. With respect to s. 30 of the *Act*, the accident occurred on April 9, 1997, within the February 1, 1996 to October 1, 1998 window during which the former wording of ss. 30 and 31 of the *Act* is engaged. The applicants argued that the worker had not made the election between civil remedies or workers compensation benefits required by s. 30-31 (as it now reads, post-October 1, 1998). Consequently, his action was barred, because his action had vested in the Board.

The Tribunal found that the action against the two applicants was not barred pursuant to ss. 28 and 29 because the applicants were neither covered employers nor employees of covered employers, under Part I of the *Act*. Hence, they did not benefit from immunity against suit.

The Tribunal also found that the action was not barred further to s. 30 of the *Act*, for two reasons. First, the Tribunal found that the *Act* as it read prior to October 1, 1998 applied to the claim; the pre-October 1, 1998 wording made no provision for an election. Hence, there was no need for the plaintiffs to make an election. (The Board had also consented to the worker's action proceeding, as was required by the pre-October 1, 1998 wording). Second, in the alternative, the Tribunal found that any requirement for an election (even if it existed) had been implicitly met to the Board's satisfaction, or had been waived by the Board.

16. *Decision 2003-648-TPA* (February 24, 2004, NSWCAT)

- Covered employers/employees
- Employer premises
- Travel to, from or during work
- Work-relatedness - tests

In *Decision 2003-648-TPA*, a Tribunal panel addressed the issue of work-relatedness in a case where the worker had not yet entered her employer's office, but was entering the building by steps leading to the front door. The panel found that injuries resulting from her fall on the top step, four feet away from the door, arose out of and in the course of her employment.

Reliance was placed on the "reasonably incidental," "enhanced exposure to risk," and "sphere of employment/place of employment" tests, as well as previous case law. The actions against the property management firm and the snow removal contractor were barred because they were covered employers. However, the suit against the applicant building owner was not barred because it was not a covered employer at the time of the accident.

17. *Decision 2004-113-TPA* (April 30, 2004, NSWCAT)

- Covered employers/employees
- Employee/independent contractor
- Scope of employment duties
- Travel to, from or during work
- Work-relatedness - tests

In *Decision 2004-113-TPA*, a Tribunal panel found that the worker's injuries arose out of and in the course of her employment. The employer provided demonstrators for instore displays. The worker was returning paperwork and equipment to the area manager's home, as the home was used for business purposes.

The panel made the following findings:

• the employer was a covered employer under the *Act*; a demonstration business is an occupation incidental to, or immediately connected with, supermarkets or retail stores and establishments (Schedule A of the *Act*)

• the worker was acting as a servant or an agent for the employer

• the area manager's husband was not employed by the employer

• the worker had an employment relationship with the employer, as distinguished from an independent contractor; the panel referred to *671122 Ontario Limited v. Sagaz Industries Canada Limited* [2001] 2 S.C.R. 983 for authority on the criteria to make that distinction.

Finally, the panel found that the worker's injuries arose out of and in the course of her employment and referred *inter alia* to *Gallie v. New Brunswick (Workplace Health, Safety and Compensation Commission)* [1996] N.B.J. No. 436. The panel found that the accident occurred while the worker was returning the company's equipment and paperwork after a demonstration. This was a job requirement; but for the employment relationship, she would not have been in the area manager's home. Her returning of the equipment to the home was reasonably incidental to her employment. The action was barred, except with reference to the area manager's husband, who was not employed by the employer.

18. *Decision 2003-799-TPA* (June 14, 2004, NSWCAT)

- Independent cause of action

In *Decision 2003-799-TPA*, a worker intended to sue alleging breach of contract. It was alleged that the employer had a contractual duty to name the worker as a co-insured in a disability insurance policy. The worker was in an accident and discovered that he was not named, and the insurer denied coverage. The Tribunal followed the decision in *Imperial Oil Ltd. v. Parsons, supra* and found that the action was not statute-barred as it was actionable without the accident having occurred.

19(a). *Decision 2004-516-TPA* (November 25, 2004, NSWCAT)

- Covered employer/employee

In *Decision 2004-516-TPA*, a covered firm sought a finding that a Plaintiff was barred by s. 28 from suing the firm. The Plaintiff's status was the central issue. The Plaintiff was an officer and director of the company who received income from dividends but was not under a contract of service, and the company had little control over the Plaintiff. The panel noted that historically the term "worker" meant a member of the working class as opposed to senior management. Section 2(ae) of the *Act* broadens the definition of worker to include active management where they are on the payroll. In this case, the Plaintiff was not on the payroll and, therefore, not a worker. The action was not barred by s. 28.

19(b). *Decision 2004-516-TPA-SUPP* (January 10, 2005, NSWCAT)

- Costs

In a supplementary decision - *Decision 2004-516-TPA-SUPP* - the panel found that the Tribunal lacked jurisdiction to award costs on a s. 29 application. The Tribunal found there was no indication that the Legislature intended the Tribunal to have the power to award costs. There was no express legislative provision granting such jurisdiction, nor can such a power be inferred by "necessary implication."

20. *Decision 2004-390-TPA* (December 20, 2004, NSWCAT)

- Employer premises
- "Highway"
- Motor vehicle exception - s. 28(2)
- Onus of proof

In *Decision 2004-390-TPA*, the worker claimed he was injured while driving a transfer truck at a container terminal. The worker claimed that WM, an employee of the third party employer, proceeded through a designated stop at the terminal while driving a "shunt truck", and struck the worker's transfer truck. The worker applied to the Tribunal under s. 29 for a determination whether his action was barred; the respondents (defendants in the civil action) argued the action was barred.

The worker bore the onus of proof as he alleged he fell within the s. 28(2) motor vehicle exception to the statutory bar.

The Tribunal concluded as follows:

> The company's shunt trucks did not operate outside the terminal, nor were they intended to. The terminal, in general, and the container pier where shunt trucks were used by the company, do not come within the definition of a "highway" pursuant to s. 2(u)(ii) of the MVA. The terminal was not open, either by design or in fact, to members of the general public ... It follows that since the shunt truck was not intended to operate on a highway, it was not required to be registered. Since the shunt truck was not registered or required to be registered under the MVA, the exception under s. 28(2) of the act does not apply and the worker's action against the respondents is barred.

21. *Decision 2005-195-TPA* (September 15, 2005, NSWCAT)

- Medical negligence

The worker sued the defendants - a hospital and a regional health authority - for the allegedly negligent medical treatment of a workplace injury. On application by the defendants, the actions were barred following the reasoning in *Queen Elizabeth II Health Sciences Centre, supra.*

22. *Decision 2005-381-TPA* (January 16, 2006, NSWCAT)

- Employer premises
- Travel to, from or during work
- Work-relatedness - tests

The worker worked in a retail store, in a shopping mall. She fell in the parking lot. She was a covered employee, and both her employer and the mall owner/manager were covered employers.

The worker was initially denied coverage by the Board; the Board suggested the possibility of a civil suit. The worker sued the mall. The mall brought an application pursuant to section 29, to bar the action. The sole issue was whether the accident "arose out of and in the course of" employment.

The action was barred. The employer was obliged to contribute to the maintenance of the parking lot. It had a contractual and commercial interest in the parking lot (the site of the fall), per the commercial lease agreement with the mall. The accident did not occur on public property, or on property unconnected to the employer; it effectively occurred at the worker's place of employment.

In its analysis, the Tribunal considered the Court of Appeal's test enunciated in *Nova Scotia (Department of Transportation & Public Works) v. Nova Scotia (Workers' Compensation Appeal Tribunal)*, 2005 NSCA 62, ["*Puddicombe*"]:

> ... [T]here are two main aspects of the 'arising out of and in the course of employment' inquiry: the nature of the work and the link between the activity of the employee giving rise to the injury and the risk of the work.

The Tribunal directed that the worker be awarded workers' compensation benefits.

23. *Decision 2005-119-TPA* (January 16, 2006, NSWCAT)

- Medical negligence

This application was brought by a regional health board, which was the worker's employer. The worker was provided with allegedly negligent medical treatment of the injury by the authority and its treating physicians. The worker's suit was barred against the health authority, following the principle in *QEII Health Sciences Centre, supra* - namely, a covered employer cannot be sued for the negligent medical treatment of a workplace injury.